In The

United States Court of Appeals

For the Ninth Circuit

No. 17595

Alsco Storm Windows, Inc.,
Appellant

vs.

United States of America,
Appellee

Alsco Northwest, Inc.,
Appellant

vs.

United States of America,
Appellee

REPLY BRIEF FOR THE APPELLANTS

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Analysis of Defendant's Cases

The defendant-appellee has raised no serious issue of law or fact in its brief. However, a brief discussion of some of the cases cited and relied upon is warranted.

It is an endless and unprofitable task to compare the details of one case with the details of another in order to establish that the conclusion of the evidence in one should be adopted in the other.

The defendant has cited a number of cases to support its contention that the installers, on the record facts and findings here, were employees under the statutes and regulations involved.

Particular emphasis was placed on the decision *Westover* v. *Stockholders Publishing Co.,* 237 F.2d 948 (CA-9) (Appellee's Brief p. 14). The category of workers involved "route district men" who handled subscription home deliveries of a newspaper in the city areas, and "dealers" who handled home deliveries and single copy sales distribution in suburban areas, rather than skilled mechanics in the building trades. Various factors of detailed control existed in *Westover* which compelled the conclusion that the workers concerned were "employees." Some of these were: (1) a written contract governed the relationship and set out the duties and obligations of each party; (2) the workers were required to canvas an area designated by the taxpayer with a frequency determined by the taxpayer; (3) the workers were required to be available at such times and places as the company designated to pick up papers brought to them; (4) carrier boys selected by the company helped the workers here; (5) they were required to maintain accurate and up-to-date lists of subscribers and their addresses which were to be available to the taxpayer on demand and not to be given to any other person; (6) they were constantly under the taxpayer's supervision concerning their activities; (7) the taxpayer could fix the prices the workers charged, and guaranteed them minimum weekly net earnings thus in effect supplying the floor and ceiling of their incomes; (8) the workers had no investment in the facilities for doing the work. None of these factors are evident with respect to the installers. The installers were masters of their own time; they could earn a great deal or little, depending on their desire to work; they had no obligation beyond the job at hand; upon completion of one job they could take another, take none, work elsewhere and later

return to plaintiff without any impairment in the relationship. They had an investment in the tools and equipment necessary for the performance of the work, they were free to hire and control their own helpers without interference from the plaintiffs; they could combine with others or work alone as they chose and divide the earnings as they decided without interference from the plaintiffs. All this is indication of a freedom not even suggested in *Westover.*

The mere fact that the workers in *Westover* were not controlled as to the details of their work, standing alone, is not determinative as to their employment status. Control becomes an important and perhaps a deciding factor when the other elements such as freedom to select jobs, being master over one's own time, investment in the tools of performance, freedom to hire and direct helpers and freedom to work for others are also evident. In *Westover* these other elements were lacking. Want of direction and control in and of itself would not make an independent contractor out of an employee. The case at bar, however, has numerous elements depicting freedom of the worker in addition to plaintiffs' lack of control over the manner and means of his performance. The difference is essential. The difference makes *Westover's* workers employees and *Alsco's* independent contractors. Nor did *Westover, supra,* suggest that it had overruled the holding of this Court in *Broderick, Inc.* v. *Squire,* 163 F.2d 980 (CA-9), that real estate salesmen were independent contractors (see Appellant's Brief pp. 33, 39); nor did it overrule *Anglim* v. *Empire Star Mines, Ltd.,* 129 F.2d 914 (CA-9), which held miners to be independent contractors (see Appellants' Brief, pp. 39, 40). The differences in categories of workers compel different decisions on the same issue of law.

Great reliance is placed upon the Massachusetts District Court's decision in *Security Roofing & Construction Co.* v.

United States, 163 F. Supp. 794, because it is an "applicator" case, holding them to be employees. (See Appellee's Brief, p. 16) However, that decision did not propose to overrule four other "applicator" cases decided in the same Circuit but by different judges. They were *Metropolitan Roofing & Modernizing Co.* v. *United States,* 125 F. Supp. 670 (Mass.); *American Homes of N. E., Inc.* v. *United States,* 173 F. Supp. 857 (Mass.); *Jagolinzer* v. *United States,* 150 F. Supp. 489 (R.I.) and *Thorson* v. *United States,* 173 F. Supp. 65 (Mass.) aff'd. 282 F.2d 157 (CA-1). Only *Thorson* was decided subsequent to *Security.* The other three were prior. All were decided in favor of the taxpayers. The United States Court of Claims distinguished a Spokane, Washington, case, *Edwards* v. *United States,* 168 F. Supp. 955 (Ct. Cl.) from *Security* in holding "installers" to be independent contractors. Some of the distinguishing features in *Edwards* which are also evident in the case here were: (1) *Security's* mechanics all devoted years of work to the one company. Here the installers varied from two to thirty and only two at most were "regulars." (2) *Security's* men were specifically prohibited from doing any additional work of any kind for a customer, and could not resolve even a minor problem without consulting the taxpayer. Here there were no such restrictions ever contemplated. (3) There were strict requirements that *Security's* men refer business to the office, here there was no such requirement, but it was optional if they wanted to earn a small commission. (4) *Security* fixed the rate of pay regardless of difficulty, here there was some basis for negotiation in unusual matters which might arise on a job. (5) *Security* hired a number of inexperienced men which required a supervisor to be on the site constantly, here only experienced men were considered by the plaintiffs and no interference was anticipated unless the desired result was not forthcoming. (6) *Security* moved men about and split crews indiscriminately, here a man

or crew usually finished a job before going to another, but there were rare occasions where the installers did go to other jobs and this was at the "request" of the plaintiffs. (7) In *Security* there was evidence of indiscriminate discharge, there was no evidence of it here and none was practiced as the arrangement was actually carried out. (8) The *Security* applicators felt compelled to take all jobs offered, good or bad, as a condition of employment, here the installers rejected unsuitable jobs without a hint of recrimination.

It is noteworthy that Judge Aldrich who wrote the opinion in *Security, supra,* as a District Court judge was later elevated to the First Circuit Court of Appeals. As an Appellate Court judge he concurred in the First Circuit's opinion in *United States* v. *Thorson,* 282 F.2d 157, which held applicators to be independent contractors on facts similar to those here. In *Thorson,* the *Security* case was readily distinguished.

The defendant seized upon isolated judicial phrases to sustain its position here. (Govt. Brief p. 16) The defendant cites *E. F. Williams* v. *United States,* 139 F. Supp. 875 (NDNY) at p. 878. ". . . it appears that the same can be only performed by an experienced roofer in a manner which is generally acceptable," and apparently concludes that this factor alone led Judge Brennan to find that *Williams'* "roofers" were employees. Those same words were used by the same judge in another applicator case where he held they were independent contractors, *Silver* v. *United States,* 131 F. Supp. 209 (NDNY). At p. 211 Judge Brennan stated:

> "It is further evidence that the work of the applicator was of such a nature that it could only, or at least most conveniently, be performed in a generally accepted manner."

The *E. F. Williams* case, *supra,* by no means overruled *Silver.* It comes as no surprise to the government that

Judge Brennan specifically distinguished *Williams* from *Silver*, although the isolated language in *Williams* deemed controlling by the government here was present in both cases. In *Williams, supra,* 139 F. Supp. at p. 887 the Court pointed out:

> "It would appear to be without profit to again discuss these statutes, regulations and decided cases which are referred to in the decision of *Silver* v. *U. S., supra.*
>
> The decision indicates in sufficient detail the guides to the conclusion to be made here.
>
> "Assuming that the *Silver* case was correctly decided and that the same general situation is involved, a similar decision does not necessarily follow because of factual differences."

The government here would torture the Findings of Fact of the Court below and reshape them to fit *E. F. Williams, supra,* in an effort to sustain its position. It's reliance on *Williams* means that the government would prefer that the Findings of Fact by the Court below should have been other than as found. It would seem that the government, as Appellee, is arguing the proposition that the facts found are "clearly erroneous." It is indeed an odd position for the prevailing party below to take on appeal. The government would suggest that the following facts in *Williams* be deemed controlling here: (1) The taxpayer furnished the equipment necessary for the performance of the work; (2) almost 50 per cent of the jobs were concerned with work paid at hourly rates necessitating a close watch on the time consumed in doing the work; (3) helpers were sent to the job by the taxpayer, who were paid at hourly rates fixed by the taxpayer and the roofer had no control over the helper; (4) Friday was "pay-day" with no exceptions. However, a loan might be negotiated out of time on request; (5) many of the jobs were flat-roofing, requiring only a mop and hot tar, pay being on an hourly rate; (6) all of the

men had been with the company 24 to 27 years. None of these facts were found by the District Court below here.

Here, the two "regulars" had the longest stay, but all others, about 30 or so, came and went; all jobs here were paid on a job-to-job basis at piece-work rates with an insignificant co-mingling of hourly rate work; an installer here could pick up his earnings at any time or wait to the end of a week or two weeks if he desired; the installers hired and fired their own helpers and completely controlled their activities; the installers furnished all their own tools and equipment for the performance of the jobs. These factors and others found by the Court below clearly distinguish *E. F. Williams, supra,* from the case at bar. The single factor of control of details of the work was absent in both cases. That element standing alone would not make *Williams'* "roofers" independent contractors. But if those same roofers had the freedom of choice and movement together with an investment in the equipment, enjoyed by Alsco's installers, their status would have tended toward that of independent contractors.

Another applicator case relied upon by the government (Appellee Brief pp. 16-17) is *Ben* v. *United States,* 139 F. Supp. 883, aff'd 241 F.2d 127 (CA-2). This was also Judge Brennan's case. Again the government seized upon isolated language (Appellee Brief pp. 16-17):

> "The element of freedom from control in the manner of the performance of the work * * * loses much of its significance when the skill of the worker is relied upon in the accomplishment of the particular task."

In *Farm & Home Modernization Co., Inc.* v. *United States,* 138 F. Supp. 423 (NDNY), decided on the same day by the same judge, held "installers" to be independent contractors. As to freedom from control the same Court said at p. 426:

> "No inspections of the work were made by the plaintiff. * * * The plaintiff appeared to rely upon a completion slip signed by the owner upon completion of the job to indicate a satisfactory performance thereof and also upon the experience of the applicator to insure the performance of the work in accordance with the contract."

Again Judge Brennan distinguished the *Silver* case while deciding that *Ben's* applicators were employees. In *Ben, supra,* 139 F. Supp. at p. 886:

> "It would appear without profit to again discuss the statutes, regulations and decided cases which are referred to in the decision of *Silver* v. *U. S., supra.* They are referred to in that decision in sufficient detail to indicate the guide posts to the conclusion to be made here. Factually the two cases differ in several important aspects even though they may be considered as embodying the same general situation."

In *Ben,* the Court found that all applicators were expected to take any job offered to them as a condition of obtaining future work. A failure to accept any job offered resulted in cutting off work summarily. Any personal trait of *Ben's* applicators deemed offensive, apart from faulty work, was cause for dismissal. The continuous presence of the applicators was expected by *Ben,* which restricted their performances elsewhere. Here was also a high rate of co-mingling of unit price and hourly rates on many jobs performed. On appeal the Second Circuit affirmed *per curiam*, 241 F.2d 127, but felt compelled to say that the case was "a close one." (At p. 128) The case at bar shows none of the restrictions by plaintiffs on the installers that were imposed by *Ben* on its applicators.

In the case at bar, the Alsco installers could reject jobs without fear of recrimination; there was no co-mingling of unit pay and hourly rate pay and some 30 installers came and went indiscriminately except for one or two "regulars."

The case *Ringling Bros.-Barnum & Bailey Com. Shows* v. *Higgins,* 189 F.2d 865 (CA-2) is readily distinguishable here. (Appellee Brief p. 18) The circus performers had signed contracts for a specified period which imposed many provisions limiting their activities. They ate, slept and traveled with the show as a unit during the period of the contract. No such restrictions are apparent in the relationship between the installers and the plaintiffs here.

Walling v. *American Needlecrafts,* 139 F.2d 60 (CA-6) is not in point. (Appellee Brief p. 19) This is a Fair Labor Standards Act case. The Supreme Court had this to say in *Walling* v. *Portland Terminal Co.,* 330 U.S. 148 at p. 150:

> "* * * in determining who are 'employees' under the [Fair Labor Standards] Act, the common law employee categories or employer-employee classifications under other statutes are not of controlling significance. [citing cases] This Act contains its own definitions, * * *."

The definition of "employee" under the FICA and FUTA Acts requires more definite tests.

Bonded Insulation & Construction Co. v. *United States,* 131 F. Supp. 635 (N.J.) (Appellee Brief, p. 19) has little bearing on the issue here. There the workers undertook to blow insulation materials into existing houses by using the taxpayer's machines and tools. They punched a time clock and were paid on an hourly rate. Their work was supervised constantly by a company official who insisted on teaching the men how to do the work.

A number of other cases, *United States* v. *Kane,* 171 F.2d 54 (CA-8), *Grace* v. *Magruder,* 148 F.2d 679 (CA DC), *United States* v. *Vogue,* 145 F.2d 609 (CA-4), and *Hearst Publications* v. *United States,* 70 F. Supp. 666, are cited as controlling in Appellee's Brief at pp. 18-19.

None of these cases concerned the category of workers involved here. Also it is significant that these cases were

decided prior to the "1948 amendment" which re-affirmed the congressional intent that the common law control test should weigh heavily to decide who were "employees" under the statutes. This legislation specifically rejected the "economic reality" test as determinative of who are "employees" under Sections 3121(d) and 3306(i), Internal Revenue Code. It would seem that the pre-1948 cases which recognized any test which expanded the definition of "employee" beyond the common law control test are without significance.

Conclusion

"The appetite for taxes is not so voracious, the commands of the statute are not so inexorable, as to require the doing of an injustice when there is open another course, if followed, will lead neither to evasion by the taxpayer nor extortion by the Government." *Hilpert* v. *Commissioner,* 151 F.2d 929, 933 (CA-5, 1945).

In view of the foregoing, the Conclusions of Law and Judgment of the District Court should be reversed.

Respectfully submitted,

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